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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 421

ANTONIO A. DIAZ, et al.,
Plaintiffs,

v.

SOUTHEASTERN DRILLING CO.
OF ARGENTINA, S.A., et al.,
Defendants,

and

TREFINA, A.G.,
Intervenor – **Petitioner**,

and

THE UNITED STATES OF AMERICA,
Intervenor – **Respondent**.

PETITION FOR WRIT OF CERTIORARI

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and
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THE UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Trefina, A.G. a Swiss corporation, prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Fifth Circuit which affirmed two actions of the United States District Court for the Northern District of Texas, Dallas Division, from which Trefina had appealed. Trefina was the first of two intervenors in the District Court and the Government of the United States, here the respondent, was the other. The Court of Appeals affirmed (1) the District Court's allowance of the Government's intervention (on the basis of an application that was never submitted), and (2) affirmed

default judgment given to the Government to punish Trefina for the failure/refusal of Mr. Widmer, its managing-director, to travel some 9,000 miles to make the discovery which Trefina assured the Government he would make where he resided or at its only place of business in Zurich, Switzerland.

OPINIONS OF THE COURT BELOW

No opinions were filed in or by the District Court with respect to the order allowing the Government's intervention or with respect to the default judgment from which Trefina appealed. The order and the judgment appear in the Appendix.

The decision of the Court of Appeals which is the subject of this Petition appears in the Appendix and is reported at F.2d . The Per Curiam order denying rehearing appears in the Appendix immediately following the subject decision.

The panel responsible for the present decision refused to allow filing of Trefina's motion and its petition for rehearing in banc, both of which had been addressed and tendered to the whole bench of the Court and not to that panel. That refusal was conveyed to Trefina's counsel in the Court of Appeals by an "authorized" letter dated June 16, 1970, and signed by a Deputy Clerk. That letter-decision of the Court appears as the final item in the Appendix.

GROUNDS FOR INVOKING JURISDICTION

(i) Substantive Grounds

Trefina relies upon the following facts as invoking the jurisdiction of this Honorable Court, to wit:

1. The subject decision is in conflict with the decisions of all other courts of the United States that have construed the substantive requirements for intervention specified in Rule 24(a)(2), Fed. R. Civ. P.

2. The Court of Appeals has, by the most necessary of implications, decided important questions of federal law that have not been but should be decided by this Honorable Court.

Although the following are implicit rather than explicit holdings of the Court below, they are readily apparent and entirely indispensable to the decision itself:

First, it reads Rule 37(d), Fed. R. Civ. P. as empowering a party to require a person who is an official of a corporate party to travel some 9,000 miles to answer the same discovery questions that the corporate party has repeatedly assured the demandant and the court that the witness would answer at his residence or at the only place of business of the corporate party; that no notice need be served on such a witness as a predicate for sanctions under the Rule; that the demandant need not evidence interest in taking the testimony of such an individual *only* because he is an officer of the corporate party; and, that Rule 54(c), 55(a) and 55(d), Fed. R. Civ. P. are not to be read as limiting the scope of action apparently permitted by Rule 37(d) with respect to default judgment. Further, rule 4(b), wherein default judgment is first mentioned in the Rules is omitted from reference by the Court notwithstanding the fact that due to the absence of a summons served by the Government upon Trefina, there is no litigational link between them upon which default judgment could be grounded. Still further, the Court declines to read the word "determination" in Rule 1 as indicating an interest on the part of the Rules in seeing to it that their respective texts are so construed as to reach whenever possible a determination of the merits of the claims submitted to the district courts.

Second, that although Rule 24(c) provides that every complaint in intervention "shall" be served "as provided in Rule 5" (i.e., without summons), the Government could disregard that Rule and serve its complaint upon certain absent persons with the kind of summons authorized by and in 28, U.S.C. Section 1655.

Third, that when a claim depends upon service of process under said Section 1655, the jurisdictional requirements specified in *Pennoyer v. Neff* do not apply.[1] Alternatively, if the

[1] *Pennoyer v. Neff* (1878), 95 U.S. 714, held that although Mr. Neff had been the owner of property in Oregon at the time the Oregon court rendered default judgment against him on the claim asserted against him by Mr. Mitchell, and although its judgment would have been unassailable if Mr. Neff's property had been reduced to the direct control of the court *before* judgment, the failure of that demandant to show that property which in fact belonged to the absent party was

Government's claim is deemed to be independent of the requirement of establishing jurisdiction under the procedure authorized by Section 1655, then the claim must be purely *in personam* and exclusively against Southeastern which is the only resident within the jurisdiction and therefore the only party on whom or against whom the Government could assert such a claim; and in such a view of the matter, the rule in *Shields v. Barrow* would not apply and the Government would not have to effect service upon the absent parties who according to its own allegations have or might have an interest in the subject of the claim asserted by it; and, in such event, the District Court was not obligated to comply with the requirements and the procedure specified in Rule 19, Fed. R. Civ. P.[2]

3. The Court of Appeals has decided an important question of constitutional law in a way that is inconsistent with applicable decision of this Honorable Court. Thus, it has decided that Rule 37(d) empowered the District Court to deny Trefina a hearing on the merits as punishment for the refusal of Mr. Widmer to travel the 9,000 miles to depose for the Government. Trefina insistently relied upon *Societe Internationale v. Rogers* but the Court of Appeals refused to take account of the Constitutional guarantee with which that decision and *Hovey v. Elliott* deal.[3]

within the jurisdiction and his failure to reduce it to the direct control of the court *before* it acted upon the merits of his claim was a failure to establish the jurisdiction of the court and the subsequent judgment was void.

[2] *Shields v. Barrow* (1854), 58 U.S. (17. How.) 130, is also a jurisdictional decision and differs from *Pennoyer v. Neff* mainly in that there was no property of the absent parties in that jurisdiction, for the proceedings in both cases were *in personam*, but in *Shields v. Barrow* there was no quasi *in rem* procedure employed. There is considerable doubt, on the level of semantics at least, as to the meaning of *Shields v. Barrow*. As Trefina reads that case, an indispensable party is one against whom a claim is asserted but who is not before the court. Since meaningful jurisdiction is power over a cause or a suit, not over a mere claim, if the defendant (or his property) is not before the court, there is no reasonable basis for the court to proceed with or act on the claim because the court has no power over its object or objective. In any event, Rule 19 requires the district courts to make the findings and to exercise the discretion it provides for. The District Court in this litigation did not comply with Rule 19.

[3] *Societe Internationale v. Rogers* (1958), 357 U.S. 197, holds at 209-210 that default judgment under Rule 37(d) can be approved despite the

(ii) Procedural Grounds: Rehearings, and Stays

Rehearing was denied by a Per Curiam order dated by and filed in the Court of Appeals on May 6, 1970. Issuance of the mandate was stayed by orders dated by and filed in said Court on May 22 and June 23, 1970, retaining custody of the mandate until June 20, 1970, respectively. No conditions were imposed upon granting those stays.

(iii) Jurisdictional Grounds

Trefina relies upon Sections 1254 and 2101 of Title 28, United States Code, as empowering this Honorable Court to entertain this Petition and to review the subject decision of the Court of Appeals.

STATEMENT OF THE QUESTIONS PRESENTED

As to the first three of the four questions here presented, Trefina has indicated the principal sub-questions comprised within each.

I – As to Rule 24, Fed. R. Civ. P.

Was Trefina entitled to a hearing on the Government's application for leave to intervene; if so, was it accorded one; and, in any event, was the Government entitled to intervene?

Constitutional assurance of a trial on the merits if and only if the circumstances surrounding the refusal to make discovery reasonably permit the inference that the recalcitrant party was in effect admitting a want of merit in his claim or defense.

Two facts make *Societe Internationale* particularly applicable to the case at bar. First, the only refusal here was the unwillingness of Mr. Widmer to travel 9,000 miles to answer the same questions he would answer at his residence or at Trefina's only place of business. And, absent a refusal to make discovery, there is no possibility of drawing the inference which *Societe Internationale* says is indispensable for upholding judgment by default. Second, if there had been a trial on the merits, the Government could not have obtained judgment against Trefina because it had asserted no demand of any kind against it and, since Trefina was a non-resident, could not have if it had wanted to do so; see cases cited in footnote 10, infra.

Thus, the instant default judgment was given as punishment and not as the allowance of another's claim that was being frustrated by a refusal to make discovery. And as was established in *Hovey v. Elliott* (1897) 167 U.S. 409, no court can employ default judgment as punishment for failure of a litigant to comply with rules of court.

Since an intervenor of right is a litigant in the lawsuit of others and is permitted therein only for the purpose of defending his interest at stake, has he the standing necessary to entitle him to oppose the intervention of another who also claims the right to intervene? If one intervenor cannot oppose the application of another, can either assert a claim against the other after the intervention is allowed?

Since the Government sought to assert a claim "unrelated to the underlying issues" in the suit for an accounting (the only action into which it was allowed to intervene), and because its only concern with the outcome of the accounting suit was in a maximum finding of "net profits" due to the fact that its tax liens were expressed as percentages of such net profits, and since the Court of Appeals expressly found that on that aspect the Government's interest was "adequately represented," did the Court err in holding that the Government had the right to intervene under Rule 24(a)(2)?

II – As to Rule 37(d), Fed. R. Civ. P.

Since in part here pertinent Rule 37(d) provides that "If * * * *an officer * * * of a [corporate] party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, * * * the court may strike * * * any pleading of that party, or dismiss the action * * * or any part thereof, or enter judgment by default against that party"; the questions then are: first, whether service of a proper notice is a prerequisite to sanction; second, whether the demandant must show that the witness' failure to appear was wilful; third, whether the rule confers any power on the demandant or the court to require an officer of a corporate party to appear at any place other than at his residence or at the corporation's place of business; and, given the facts of this case, was the District Court justified in finding Trefina in default?*

As to Notice and Service: If the Rule had meant that actual notice was to be enough, why does it require service of a proper notice? Since actual notice of a demandant's desire to take a witness' deposition cannot excuse the demandant for not subpoenaing that witness (under Rule 30(g)(2)), on what basis can a demandant be excused for failing to serve the witness with a proper notice (less difficult to accomplish that service of a

subpoena) as required under the Rule? If there is a difference in these two situations, what is the difference?

As to Purpose of the Rule: Is the silence of the Rule respecting the place at which a corporate party's officer must present himself for deposition a pregnant or a barren silence? Rules 30(a) and 37(d) are equally silent on the matter of place; and yet no one reads the silence of Rule 30(a) as permissive: why, then, read the silence of Rule 37(d) as meaning anything more than that the Rule does not impose any obligation upon such a witness to travel? Why read that silence as a grant of power?

As to Power: If a district court has inherent power to enter such an order as was entered below, why was Rule 45, Fed. R. Civ. P. at such pains to confer that precise kind of power upon the district courts and to limit the exercise of that power so stringently?

As to Power and Policy: Since no district court can, except under special statute, require any witness in a civil case to travel more than 100 miles to testify at a hearing or trial, upon what basis could this Rule empower a court to impose upon an individual who is a corporate officer a greater burden or obligation especially when to do so would be to subject such an individual to a greater burden in the matter of travel for testimonial purposes than upon anyone who is not a corporate officer?

III — As to the Fifth Amendment: hearing on merits

Does Rule 37(d) stand so splendidly alone as the Court of Appeals seems to believe? Is it correct to say, as the Court below does, that the validity of the present default judgment is "an issue that depends entirely on the circumstances surrounding that failure [i.e., Mr. Widmer's "failure" to travel those 9,000 miles]as considered in the light of a procedural rule, Fed. R. Civ. P. Rule 37(d)"?

Was the Court of Appeals justified in refusing to take account of the rule in *Societe Internationale* and in *Hovey v. Elliott* (supra note 3) since there was no refusal to make discovery and there was only a refusal to travel some 9,000 miles to answer

such questions as the witness could just as well answer at his residence or at Trefina's place of business?

IV As to Defects in the District Court's Jurisdiction

Assuming without admitting, that the Government could serve its complaint in intervention with a summons of the sort authorized in Section 1655, did the specific ruling in Pennoyer v. Neff obligate the Government to show that property that in fact belonged to the absent part was within the jurisdiction and to reduce it to the direct control of the District Court before that Court could take action of any kind on its claim?

TEXTS OF CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

CONSTITUTIONAL PROVISION INVOLVED:

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED:

Title 26, United States Code:

Section 7403. Action to enforce lien or to subject property to payment of tax

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree.—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all

merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs.

* * *

Section 7424. (Internal Revenue Code of 1954). Intervention

If the United States is not a party to a civil action or suit, the United States may intervene in such action or suit to assert any lien arising under this title on the property which is the subject of such action or suit. The provision of section 2410 of title 28 of the United States Code [except sub section (b)] and of section 1444 of title 28 of the United States Code shall apply in any case in which the United States intervenes as if the United States had originally been named a defendent in such action or suits. In any case in which the application of the United States to intervene is denied, the adjudication in such civil action or suit shall have no effect upon such lien.

Title 28, United States Code:

Section 46. Assignment of judges; divisions; hearings; quorum

* * *

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

* * *

Section 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Section 1292. Interlocutory decisions

* * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Section 1655. Lien enforcement; absent defendants

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just.

Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay

* * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

COURT RULES INVOLVED

Federal Rules of Appellate Procedure

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26 (b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Rule 35. Determination of causes by the court in Banc

* * *

(c) Time for Suggestion of a Party for Rehearing in Banc; Suggestion does Not Stay Mandate. If a party desires to suggest a rehearing in banc, the suggestion must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Federal Rules of Civil Procedure

Rule 1. Scope of rules

These rules govern the procedure in the United States ditrict courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 4: Process

* * *

(b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. When, under Rule 4 (e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

* * *

Rule 8. General rules of pleading

(a) Claims for Relief. A pleading which sets forth a claim for

relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the ground upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

* * *

Rule 19. Joinder of persons needed for just adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to *venue and his joinder* would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible

If a person as described in subdivision (a) (1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will

be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)–(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to

intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., Section 2403.

Rule 30. Depositions upon oral examination

(a) Notice of Examination' Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

* * *

(g) Failure to Attend or to Serve Subpoena; Expenses.

* * *

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Rule 37. Refusal to make discovery: Consequences

* * *

(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of

such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

* * *

Rule 45. Subpoena

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

* * *

(c) Service. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produced designated books, papers, documents, or tangible things which consitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the

county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a Hearing or Trial

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., Section 1783.

* * *

Rule 54. Judgments; Costs

* * *

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not damanded such relief in his pleadings.

* * *

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

* * *

(d) **Plaintiffs, Counterclaimants, Cross-Claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

* * *

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STATEMENT OF THE CASE

Separate suits were brought in the District Court below in December 1966 against Southeastern and related defendants by two plaintiffs claiming under a 1959 agreement in which Southeastern Drilling Co. had promised certain commissions based upon the net profits it expected to realize under a drilling contract in Argentina.

The first plaintiff, Mr. Antonio A. Diaz, claimed the unpaid balance of the 4% commission that had been promised him in the 1959 agreement. He also claimed one-fifth of the 5% commission that was payable to Mr. Charles F. O'Neall, and one-fifth of the 5% commission promised to Mr. William N. Dillin. His claim to those one-fifth interests rested upon two writings which he contended were assignments in his favor.

The second plaintiff, Great American as Mr. Dillin's assignee demanded payment from Southeastern of the unpaid balance of the full 5% commission due Mr. Dillin. It made no reference to the Diaz claim to one-fifth of the Dillin commission.

Southeastern admitted the validity of the 1959 agreement and asked that the Diaz and Great American suits be consolidated. That unopposed motion was duly granted.

Southeastern also asked, under Rule 19, Fed. R. Civ. P., that so much of the Diaz claim as related to one-fifth of the O'Neall commission be dismissed because it was known that the writing he claimed was an assignment had been denounced or repudiated by Mr. O'Neall. Southeastern pointed out that Mr. O'Neall was not subject to service in the jurisdiction and had not been joined by Mr. Diaz, and since that claim could not be adjudicated in his absence, it should be dismissed.

Before the District Court was prepared to act on Southeastern's Rule 19 motion, Trefina filed its motion for leave to intervene as the assignee of the unpaid balance of the full 5% of the O'Neall commission. Trefina opposed the Diaz claim to any part of the O'Neall commission and demanded that Southeastern make an accounting of its net profits and pay to it the full balance of that 5% originally promised to its assignor, Mr. O'Neall.

Trefina's motion was heard on April 6, 1967. Counsel for all parties were present. The intervention was allowed without objection. At the same time, Southeastern's motion for dismissal under Rule 19 was denied.

On April 7, 1969, the day following approval of Trefina's intervention as aforesaid, the United States Government made deficiency tax assessments against the Messrs O'Neall and Dillin for federal income taxes for the years 1963-1965, forthwith served Southeastern with notice of the tax liens which implemented those deficiency assessments, and levied upon Southeastern the demand that it pay over the balance owed said taxpayers under the 1959 agreement in satisfaction of said tax liens. Southeastern does not appear to have responded to the levy, and the Government does not appear to have taken any further action with respect thereto until it filed on January 31, 1968, its motion for intervention for the purpose of foreclosing its tax liens and obtaining enforcement of the levy.

On January 10, 1968, about twenty days before the Government moved to intervene, Southeastern, Diaz, Great American, and Trefina jointly moved the Court to sever from the main action the dispute between Diaz, Great American, and Trefina as to their respective rights in the accounting suit against Southeastern. That joint motion also asked that Southeastern be excused from the commission-rights litigation. The agreement of Diaz, Great American, and Trefina to join in requesting the severance was obtained in exchange for Southeastern's promise to make certain escrow deposits (totaling more than $700,000) in the amount of the unpaid balance which Southeastern admitted was unpaid and, except for a contingency now removed, due and payable under the 1959 agreement. Under the private escrow agreement of January 10, 1968, which was incorporated into the Pre Trial Order to insure enforceability against Southeastern, Southeastern in due course made five separate escrow deposits: Account "A" for the 1% commission claimed by Mr. Diaz and Great American; Account "B" for the 1% commission claimed by Mr. Diaz and Trefina; Account "C" for the balance due on the portion of the Dillin commission as to which Mr. Diaz asserted no claim; Account "D" the unpaid balance on Mr. Diaz' own 4%; and, Account "E" the balance due on the portion of the O'Neall commission as to which Mr. Diaz

asserted no claim. Account "E" is here involved and has a present value in excess of $80,000.

On January 10, 1968, the Court ordered the severance, set the commission-rights trial for February 5, 1968, and excused Southeastern therefrom.

On January 31, 1968, the Government filed its Motion for Leave to Intervene for the declared purpose of foreclosing its tax liens upon the rights, if any, of the said taxpayers to receive any payments from Southeastern. In its Complaint in Intervention which accompanied that Motion, the Government prayed that Southeastern or any related defendant "having possession" of funds due and owing to them be compelled to pay such monies to the Government in satisfaction of the said tax liens. In its Motion to Join Additional Party-Defendants which accompanied the foregoing, the Government declared that the said taxpayers had or might have an interest in the commissions due from Southeastern and should therefore be joined since it was the Government's purpose in intervening was to foreclose its tax liens previously asserted against any interest they might have in the commissions payable by Southeastern under the agreement of 1959.

The Government relied exclusively upon Section 7424 of the Internal Revenue Code of 1954, (26 U.S.C. Section 7424) as grounds justifying its intervention. It contended that the statute conferred upon it the unconditional right to intervene as contemplated by Rule 24(a)(1), Fed. R. Civ. P.

Because it relied exclusively upon Section 7424, the Government made no showing as is required by Rule 24(a)(2). It did not (how could it have?) allege that there was any relationship between its tax liens and any issue involved in the accounting suit other than the finding as to the total of Southeastern's net profits since the dollar value of its tax liens depended on that figure of which they were percentages. Even on the matter of that "interest", however, the Government failed to make the necessary claim that its interest was not adequately represented by the existing parties. And although the *need* to intervene to protect an interest which might be prejudiced by some determination by the court of an issue in the main action is central to the whole purpose of Rule 24(a)

(2), the Government made no allegation or showing of such a need. It could not have done so had it tried. Its levy upon Southeastern was effected on April 7, 1967, long before any escrow deposits were made. That levy covered the totality of anything the Government could recover under the 1959 agreement. Southeastern did not imperil or affect the Governments levy upon it by the escrow deposits it made in January 1968.

The Government made no mention of Trefina anywhere in either of its two Motions or the Complaint related thereto: not even by so much as an "et al." in the caption. Nor did the Complaint allege any fact that would permit the inference that the Government was asserting an advesarial claim against anyone except the said taxpayers against whom it sought to foreclose its tax liens and against Southeastern to require compliance with the levy of April 7, 1967. No allegation in the said Motions or Complaint suggest that the Government's tax liens were prior and/or superior to any claim asserted by Mr. Diaz, by Great American, or by Trefina against Southeastern. In the prayers in its Complaint, however, the Government included the following demand for relief:

> "That this Court determine the validity and priority of the liens and claims of the parties to this consolidated cause."

If the Government's complaint had attacked the validity of any claim asserted by any of the three claimants and had by "a short and plain statement" shown that if the Government's claims were true its tax liens were prior and superior, the above prayer would have been permissible. But, the Government made no such allegation[4]

[4]The Federal Rules of Civil Procedure do not permit any litigant to escape the burden of pleading as the Government has here apparently endeavored to do by the device of this unfounded prayer. Whether this was a calculated attempt to evade the restrictions imposed by Rule 11, Trefina cannot say. But, it is clear from Rule 8(a) that an unsupported demand for judgment such as the above is inadmissible. In part here pertinent, with italics added, Rule 8(a) reads thus:

Before the commencement of the trial of February 5, 1968, the Government made it clear to the District Judge that it did not want to intervene in the commission-rights litigation. Southeastern had been excused from that suit, and in explaining its position to the Court the Government said, "we are talking about Southeastern" and later added "we have levied upon Southeastern, and they have got a legal problem there."

The District Judge made it clear that he would not permit the Government to intervene in the commission-rights trial. He authorized the Government to call up its motion "after" that suit was concluded. However, before the jury returned its findings in that trial, the District Judge *sua sponte*, and without notice to Trefina, called the Government's application for immediate action. Trefina stated that it opposed the intervention "on a number of grounds" and asked leave to prepare and submit a brief thereon which, quite obviously, it could not have prepared earlier. The District Judge refused saying, "I am not disposed to wait and let Trefina tell me what to do about a thing of this kind." Intervention was then allowed. The Court of Appeals characterized the foregoing as "a hearing," and said also Trefina had not opposed the intervention.

The Government was also allowed to add the said taxpayers as party-defendants using the service of process authorized by 28 U.S.C. Section 1655, notwithstanding the fact that Rule 24(c) expressly declares that every complaint in intervention "shall" be served "as provided in Rule 5" which does not contemplate summons under that or any other statute.

The Government took steps under Section 1655 to serve summons upon said taxpayers, but it failed to reduce any property to the direct control of the District Court since it was unable to identify any property or rights in the jurisdiction that in fact belonged to either of the said taxpayers.

> "A pleading which sets forth a claim for relief * * * shall contain * * * (2) a short and plain statement showing the pleader is entitled to relief, *and* (3) a demand for the relief to which he deems himself entitled."

Having made no allegation in its Complaint as to the comparative merits of its tax liens, the Government was not entitled to ask the Court to make a comparative evaluation of the claims asserted by the other litigants against Southeastern.

~~in fact belonged to either of the said taxpayers.~~

On July 12, 1968, under an appropriate caption, the Government mailed the following notice to Trefina's attorney in the trial court:

NOTICE TO TAKE DEPOSITION

To: Garland F. Smith
Smith, McIlheran & Jenkins
P. O. Box 416
Weslaco, Texas

Please take notice that the Intervenor United States of America, pursuant to the Federal Rules of Civil Procedure, will take the deposition on oral examination of the following named person at the office of the United States Attorney, 301 Post Office Building, Dallas, Texas, on August 5, 1968, at the time indicated:

~~Mr. Widmer, Officer~~
Trefina, A.G.
Beethovenstrasse, 9/11
Zurich 2, Switzerland

Commencing at 2:00 p.m.

You are notified to appear and take part in the examination as you may deem advisable.

The record does not suggest that the Government served the above or any other notice upon Mr. Widmer, or that the Government had any reason to believe the truth of the representation of fact therein made, i.e., that Mr. Widmer would appear at the time and place specified. There was no simultaneous service of that notice upon anyone. However, in the subject decision the Court of Appeals said: "The notice, however, was addressed to 'Mr. Widmer, Officer Trefina, A.G.', and was served simultaneously on Trefina's attorney of record, and therefore this argument [i.e., Trefina's argument that no "proper notice" had been "served" upon the witness and, consequently no predicate for sanctions under the Rule had

been laid] is without merit."

Trefina retained special, temporary counsel to oppose the Government's *travel* demand, and when it was confirmed to the Government that Mr. Widmer would not appear, the government *forthwith* presented a carefully prepared motion for default judgment and objecting to Trefina's failure to have given earlier notice of non-compliance to Mr. Widmer's unwillingness to comply with its demand. Trefina opposed that motion, asked the Court to vacate the notice on July 12, 1968, and informed the Government and the District Court that Mr. Widmer would depose orally or in writing at his residence or at Trefina's only place of business in Zurich, Switzerland.

The District Court denied relief to Trefina and ordered Mr. Widmer's deposition taken within sixty days in New York, New York. The order does not suggest that it was to be the deposition of Trefina. Neither the Government nor the Court served Mr. Widmer with a copy of that order.

Mr. Widmer did not appear in New York within the said sixty days, the Government again moved for default judgment, and Trefina filed a number of motions which need not be detailed here but which included the presentation of a certification from one of the leading doctors of Zurich who is associated with one of the most prestigious medical institutions in Europe. After identifying Mr. Widmer as a patient receiving treatment from him for a circulatory condition, that doctor said that in view of that condition he considered that Mr. Widmer should not make any trip of any major importance. Mr. Widmer was then about 67 years of age.

Trefina also urged that the Government's intervention be vacated, challenged the sufficiency of the Government's notice as a predicate for sanctions under Rule 37(d), and repeated the assurances that Mr. Widmer would depose orally or in writing at his residence or at Trefina's only place of business in Zurich.

The District Judge denied relief to Trefina, suspended action on the Government's motion for default judgment, and ordered that Mr. Widmer's deposition be taken in New York within thirty days. This action was taken: (1) without any mention of

the taking of a deposition of Trefina; (2) without any showing as to the then present authority of Mr. Widmer to speak for Trefina or any indication of there being any interest on the part of the Government in taking the deposition of Trefina as distinguished from taking the personal deposition of Mr. Widmer (who had signed the assignment agreement with Mr. O'Neall); and, (3) without any showing as to the inadequacy of the aforesaid medical certificate.

Trefina promptly moved for leave to appeal under 28 U.S.C. Section 1292(b) on the ground that the issues were clearly drawn, that the significance of the issues to the litigation was of a determinative nature, that there was a substantial basis for disagreement, and that delay would serve no useful purpose. That request was denied. The fruitless thirty days upon which the District Court thus insisted duly transpired; no one changed legal position or opinion; Mr. Widmer again "failed" to travel the 9,000 miles that the Government insisted he travel; the Government again sought default judgment; and, to protect its position Trefina had to again reassert its demands for relief and repeat its assurance that Mr. Widmer would depose in Zurich.[5]

This time, however, Trefina added to its opposition the fact that the default judgment which the Government had drafted for the Court was in violation of Rule 54(c) in that it proposed to grant relief different in kind and (as to Trefina) greater in amount than that prayed for in the damand for judgment in the Complaint. However, the District Judge granted the default judgment to the Government saying that he would let Trefina raise its objection based on Rule 54(c) by a motion to set aside. Trefina promptly filed notice of appeal and submitted its brief in the Fifth Circuit in less than four months thereafter.

Trefina urged the Court of Appeals to reverse on the ground that 26 U.S.C. Section 7424 did not confer upon the Government the unconditional right to intervene. The Government picked up that gauntlet and as a principal argument in urging affirmance it insisted that the statute did confer that unconditional right upon it. The Government declined to respond to Trefina's showing that it could not have qualified under Rule 24(a)(2).

[5] In footnote 4 of the subject decision, the Court of Appeals took Trefina to task for repeating its position at the hearing of December 5, 1968, and it indulged in unsupported and unsupportable innuendo as the said medical certificate.

Although Trefina urged that the Government had no interest at risk in the main action, that no disposition by the District Court of any issue in the main action could impair or impede the Government's ability to protect its interest (i.e., nothing the Court could have done could have interfered with the Government's ability to enforce its tax liens), and that its only concern with the main action was that it wanted to see the maximum finding of net profits charged against Southeastern since the value of its tax liens was expressed as percentages of that still undetermined amount. But even as to that matter, which was the only relationship between the Government's claim and the main action, the Government could not show that it could add anything to the presentation of that issue: its interest in the amount of net profit was more than adequately represented, for three hungry lions were preparing their respective attacks upon Southeastern.

To this, the Government responded not at all: it insisted that the statute gave it the unconditional right to intervene. However, the Court of Appeals spoke to that issue and declared that the Government was qualified to intervene under Rule 24(a)(2), and while acknowledging that the Government could not intervene under the statute on which it had so exclusively relied, the Court held that it could have intervened under Rule 24(a)(2). The Court took no account of the stubborn fact that the Government declined to even discuss intervention in its brief except upon the basis of Section 7424.

The Government's response to Trefina's arguments respecting the purpose and limitations of Rule 37(d) as explained in *Societe Internationale v. Rogers*, supra, note 3, and in the matter of the impropriety of the default judgment under Rule 54(c), consisted of trying to make it appear that the default judgment was the restrained response of a long suffering district judge who had seen his court's authority flouted by a Swiss named Mr. Widmer and that Trefina by virtue of being his employer should pay over to the Government some $80,000 as punishment.[6]

[6] The Court of Appeals made reference in its decision to Damocles and the sword with the suggestion that Trefina should have moved. But the whole point of that story was and is, of course, that Damocles could not move. Reference to the plight of Damocles is a permissibly literary allusion to describe the ordeal of one who must suffer the anguish of imminent peril without hope of being able to move out of the way.

The Government was also silent with respect to *Kauffman*, *Burger Chef*, and *Exchange National*, infra note 10. However, the Government did make the astonishing statement in its brief that if the District Court had not allowed the intervention "the Government would have been forced to bring a separate action against appellant [Trefina]."

That statement is astonishing because it in effect admits that the Government was asserting an *in personam* claim against Trefina. But that is utterly inconsistent with the written and oral representations made by the Government to the Court in justification of its intervention and in explanation as to its purpose in intervening.

The Court of Appeals affirmed the Government's intervention while admitting that the statute on which the Government relied did not confer upon it the authority claimed. And the Court affirmed the default judgment without dealing with the limitations imposed by Rules 54(c), 55(a) and (d) and without taking account of the purpose and limitations of Rule 37(d) itself, and most pointedly of all, the Court declined to take account of *Société Internationale v. Rogers*.

Trefina's petition for rehearing was denied on May 6, 1970. Before that denial Trefina asked its counsel in the Court below to submit a Petition for Rehearing in banc. There was some confusion and only part of that request was submitted to the Court and by mistake it was regarded as having been submitted to the same panel that was responsible for the present decision. By the time steps were taken to make sure that the request would be submitted in proper form and with the required number of copies for in banc consideration, the panel denied the incomplete request. When the complete request was tendered to the whole bench, the panel treated it as if it had been submitted to it rather than to the whole bench and notwithstanding the fact that that Motion made the kind of showing required by Rule 2, Fed. R. App. P., and was clearly intending to invoke the power therein reserved to the Court in banc to obtain a waiver of the time limitation in Rule 35(c), the

Happily, Damocles came to no harm. Unhappily, Trefina did. Damocles was innocent of wrong, and so too was Trefina. Damocles suffered his ordeal as an amusement ordered by a tyrant. It seems strange to Trefina that the Court should have alluded to *that* story.

panel refused to consider the request or to allow it to be submitted to the whole bench. Trefina relied upon the right of petition conferred by 28 U.S.C. Section 46(c) (a right which most merits the protection of the law since it is the weakest of legal rights) and urged that while the Court of Appeals had custody of the mandate, it had jurisdiction to entertain and should entertain a petition for rehearing in banc.

This Petition followed.

DEFECTIVE JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction over so much of this litigation as involved the claims asserted by Mr. Diaz and by Great American against Southeastern and its related defendants because both claims exceeded in value the sum of $10,000 exclusive of interests and costs and there was complete diversity of citizenship; thus, the requirements of Section 1332(a) of 28 U.S.C. were satisfied.

Trefina's intervention to oppose the claim asserted by Mr. Diaz to one-fifth of the O'Neall commission was an intervention of right and since the assertion of that defense neither added to nor detracted from the jurisdiction of the Court over the initial claim, a jurisdictional showing by Trefina was not necessary. Nor was there any need to establish jurisdiction over the claim that Trefina asserted against Southeastern which was, in fact, a permissive intervention although it seems to have been granted as if it were a matter of right. However, since Trefina's claim against Southeastern depended upon exactly the same issues of fact and of law that governed the accounting suit over which the Court already had jurisdiction, Trefina's intervention presented no new need to inquire into jurisdiction and it was clearly a permissive intervention. But, if a jurisdictional showing had been necessary, the facts alleged by Trefina amply established that the value of its claim and its defense exceeded in value the sum of $10,000 exclusive of interest and costs and that there was complete diversity of citizenship so that jurisdiction existed under the said Section 1332(a).

However, the District Court had no jurisdiction over the merits of the claim asserted by the Government. The jurisdictional problem arose by virtue of the fact that the Government's claim was, in the words of the Court of Appeals, "unrelated to the underlying issues" in the suit into which it was allowed to intervene. The Government sought to superimpose a wholly new legal action upon an existing lawsuit but it never overcame the difficulty of establishing jurisdiction.

It is convenient to dispose of the matter of permissive intervention at the outset. Since no issue pertinent to the Government's claim is common to the suit asserted by the

original plaintiffs or the defenses raised by Southeastern, the Government could not intervene under Rules 24(b)(2). If it had claimed that 26 U.S.C. Section 7424 endowed it with the conditional right to intervene, such a submission would have had to be directed to the discretion of the District Court. Since no such submission was made and since no discretion was exercised under the terms of Rule 24(b)(1), it follows from the present record that there was and is no way in which the Government's intervention can be regarded as permissive.

The Government insisted that it had the unconditional statutory right to intervene and that motion was granted. If the Government had stopped there, no question of jurisdiction would have arisen; but it did not stop there. Although Rule 24(c) provides that every complaint in intervention "shall" be served "as provided in Rule 5" — which is to say without summons — the Government proceeded to summons the aforesaid absent taxpayers by making use of the procedure provided for in 28 U.S.C. Section 1655. That is the point at which the jurisdictional problem becomes evident, because under the specific holding in *Pennoyer* v. *Neff* (note 1, supra) wherever a claim depends upon statutory service of process upon an absent party, the court can take no action on the merits of the claim until the claimant has established as a fact that the absent party is the owner of property within the jurisdiction and that his property has been reduced to the direct control of the court. The Government failed to take either step and consequently the Court was without jurisdiction over that separate suit and it had no power to enter any judgment upon the Government's claim.

The absence of the Court's jurisdiction cannot be overcome by assuming that the service under Section 1655 was unnecessary and that the Government was in fact asserting an *in personam* claim against Southeastern even though, since Southeastern was resident in the jurisdiction, there was no jurisdictional question as to the Government's right to assert an *in personam* claim against it. But, since the Government itself alleged that the absent taxpayers had or might have an interest in the rights which it sought to foreclose, the Government could not ask any adjudication of such a claim on a purely *in personam* basis unless it effected personal service on the taxpayers. Whether this is or is not regarded as having been

settled by *Shields* v. *Barrow*, note 2 supra, the fact remains that the District Court was confronted by the fact that two parties who could not be served were alleged to have a possible interest in the outcome of the Government's claim, and the Court was required to proceed under Rule 19 unless service of process under Section 1655 was effective. That Court took no action under Rule 19 and since it is the only court that is empowered to act thereunder, the jurisdictional question must be determined by reference directly to Section 1655, *Pennoyer* v. *Neff*, and Rule 24(c).

Lastly, it cannot be found, from this record, that the Government was proceeding *in rem*. Thus, in its Motion for Leave to Intervene the Government stated that it was seeking to "foreclose its federal tax liens against any interest [i.e., the interest, if any] of Charles F. O'Neall and William N. Dillin in and to the funds or right to funds involved in this consolidated cause and against any indebtedness of Southeastern [or any of its related defendants, to said taxpayers]." That, of course, is the statement of an *in personam* claim. Further, in its Complaint in Intervention the Government demanded that the District Court "require the defendant Southeastern Drilling Company of Argentina, S.A., or any proper officer of such corporation, to comply with the levy [of April 7, 1967, and that Southeastern be required to make a final accounting of the net profits in which the said taxpayers] have or may have an interest or may claim a right *to receive such funds by virtue of the* [commission] *agreement* [of February 13, 1959]" i.e., a right to receive payment from Southeastern.[7] In that same Complaint the Government demanded that the Court "decree that the federal tax liens on the indebtedness of Southeastern [to said taxpayers] be foreclosed and that the defendant, Southeastern Drilling Company of Argentina, S.A., or any such person or persons *having possession* of the funds due and owing to [said taxpayers] be compelled to pay such monies to the United States of America in satisfaction of the federal tax liens described herein."[8]

[7]The italics are added here to emphasize the fact that the Government did not allege unqualified ownership of the taxpayers, did not identify any particular fund or deposit, and that it sought to foreclose on such right or rights as they had "by virtue" of the 1959 agreement which, of course, meant their rights to collect from Southeastern.

[8]The words "having possession" are here italicized to call attention to the fact that the Government was not asserting any interest in any monies or funds that had been deposited in escrow; an escrow deposit

In its Motion to Join Additional Party-Defendants, the Government explained the need to join the said taxpayers on the ground that "each have or may have an interest in and to the funds or a right to the funds" due from Southeastern, and it concludes the Motion by saying that joinder is necessary because in its Complaint in Intervention it seeks "to foreclose its federal tax liens against the respective interests of [said taxpayers] in and to the funds or their right to the funds involved in this consolidated cause and that [said taxpayers] should be joined in this consolidated action pursuant to the provisions of Section 7403(b) of the Internal Revenue Code of 1954." The cited Section was and is without relevance.[9]

But could it not be said that the Government was really proceeding against Southeastern *in personam* and that since Southeastern was present before the Court *and* resident within the jurisdiction it was consequently subject to being sued *in personam* in the District Court and that the defects in respect of *Pennoyer v. Neff* should be disregarded as mere superfluous acts intended to give notice that did not have to be given as a condition of maintaining an *in personam* action against Southeastern and that therefore those failures were immaterial?

There is much to be said for such an appraisal of the facts, but it would fail to change the result: The Government was of course proceeding against Southeastern because it was the only

necessarily divests the depositor of possession. The Court of Appeal speaks of a fund before the District Court. But there was no such fund. The escrow deposits were related only to the commission rights trial and were, in any event, made pursuant to private agreement and the court had no direct access to those deposits.

[9]Section 7403(b) applies only to cases initiated by the Government, and even then it authorizes joinder only as to "persons having liens upon or claiming an interest in the property involved in such action." There was no showing by the Government that Mr. O'Neall was within the class defined by the statute. On the other hand the record discloses that he executed an affidavit of disclaimer about one week *after* the Government served Trefina with copy of its Motion for Leave to Intervene (together with its attachments and related papers), and that his disclaimer was filed about one week *before* the Government was allowed to intervene. Despite that notice, the Government never disputed the disclaimer and it could be held that it therefore concurred in same. But, since the Government was allowed to intervene *only* in the accounting "phase" of this litigation, and since no issue respecting Mr. O'Neall's ownership could possibly arise in that action, it would seem that the proper disposition of this matter is to regard such allegations in the Government's Complaint as irrelevant.

resident party in the jurisdiction and consequently the only one against whom the Government could legally assert any claim for relief.[10] But it is evident from the Government's own assessment of its claim against Southeastern that it is valid only if the absent taxpayers *do* have an interest in the said commissions; and, if they have an interest, and the Government must proceed *quasi in rem* under Section 1655 then its failure to comply with *Pennoyer v. Neff* is fatal.

[10] *Kauffman v. Kebert* (WD-Penn., 1954) 16 F.R.D. 225, denied intervention to an applicant who, like the Government in the District Court below, wanted to assert an *in personam* claim against a non-resident party before the court, just as Trefina was a non-resident below. Unlike the District Court below, however, the Judge in *Kauffman* refused to allow Rule 24 to be subverted and the applicant in that case was not allowed to use Rule 24 to overcome his inability to otherwise sue in a jurisdiction specially favorable to his claim. The integrety of Rule 24 was also upheld in *Burger Chef Systems, Inc. v. Burger Chef of Michigan, Inc.* (6th Cir., 1964) 334 F. 2d. 926, and *Exchange National Bank of Chicago v. Abramson* (Minn., 1968) 45 F.R.D. 97.

Although these three cases were cited to the Court of Appeals they are not alluded to in the subject decision, unless they are the cases the Court of Appeals had in mind, in its inappripriate reference to "bootstrap" situations in its footnote number 3. A bootstrap situation is one in which a litigant attempts to improve his lawful lot by his own fiat, and *Kauffman, Burger Chef,* and *Exchange National* had nothing to do with that sort of problem. Those cases dealt with efforts to abuse and subvert Rule 24. The naked difference between those three cases and the subject decision of the Court of Appeals is that they respected the purpose of the Rule whereas the present decision did not.

REASONS FOR GRANTING THE WRIT

As to Intervention

Rule 24(a)(2) serves two important purposes. First it permits a third person to intervene in the private litigation of others when he has a right at stake in their suit and if it appears that the court's ruling thereon might prejudice his ability to defend or protect that right. Second, it protects the substance of the right of private parties to settle their disputes in private litigation by providing that if one or more of the parties already before the court is engaged and able to protect the interest with which the would be intervenor is concerned; and that if such representation would be adequate, the intervention must be denied.

Rule 24(b) performs a similiar balancing of interests as it allows an intervenor to assert either a claim or a defense when it depends upon an issue of law or fact that is already before the court. And whereas no intervenor of right can assert a claim for affirmative relief (as the Government was nevertheless allowed to do) there is no such limitation when permissive intervention is sought and when the district court exercises its discretion to allow such claim to be asserted. Rule 24(b)(2), like its companion, also concerns itself with the protection of the substance of the right to private litigation by providing that permissive intervention can be allowed only when it will not delay or prejudice the efforts of the *original* parties.

Related to the above is the important question of whether one intervenor can be allowed to assert any claim against another intervenor. Consideration of that question necessarily probes the purpose of the Rule itself and defines one of the limits to which the device of intervention can be put.

Further, there is the urgently important question as to the meaning of the requirement in Rule 24(c) that all complaints in intervention "shall" be served "as provided in Rule 5" i.e., without summons. The Government violated that clear command as an incident to its making use of the procedure for statutory service upon absent persons allowed when a litigant can properly invoke 28 U.S.C. Section 1655. But, in

view of the evident policy declared in Rule 24(c) of forbidding use of the subpoena by an intervenor, should any intervenor be allowed to make use of Section 1655? Does not the act of serving a summons in support of a demand for relief automatically raise a question as to the Court's jurisdiction? Should an intervenor be allowed to "delay or prejudice the adjudication of the rights of the original parties" by raising such an issue which since it *is* jurisdictional, is entirely outside the scope of their litigation? It is important for counsel and courts to know whether service of a summons by an applicant for intervention automatically destroys his status as an intervenor and makes him either a full party in a new suit of nothing; in other words, does service of a summons by an applicant for intervention destroy the application to intervene?

Lastly, it is important for this Honorable Court to indicate whether and to what extent the heretofore announced reasons for the 1966 revision of the Rule are valid, for clearly the subject decision of the Court of Appeals casts doubt upon one of the most important: the purpose of eliminating the dominance of the fund-to-distribute test which had degenerated into an "as-if" wonderland where it became "possible for a court to find a fund in almost any in personam action" (Notes of Advisory Committee on Rules, page 122 of Cumulative Annual Pocket Part, Title 28, United States Code Annotated, Federal Rules of Civil Procedure, Rules 17 to 33, quoting Professor Moore). Here that old technique was resorted to again. The test should be whether the applicant has a *need* to intervene to protect an interest that is at stake in the main action; the Court of Appeals, however, approached the problem from the rear and failed to appreciate the nature of the right which the Rule seeks to protect, for it has commenced with finding "a fund before the court" and thence it proceeds down the familiar path of the fund-to-distribute concept, a pathway which leads away from rather than into the inquiry as to whether there is a need for the applicant to intervene. The fact that the applicant wants a share of a fund before the court is not pertinent to the test in Rule 24(a) unless he can show that his interest is related and limited to that particular fund.

As to Discovery

Demands are issued daily under the Rule 37(d) and it is not to be doubted that every district court is plagued with disputes as to where a corporate officer must appear to depose and whether his reasons for not appearing at a time and place unilaterally determined upon by a demandant are valid, or whether his failure can be shown to be wilful.

The Second Circuit has had the most experience with long-distance litigation and it seems to have evolved a general rule which is in accordance with the position Terfina urges, and entirely contrary to the position adopted by the Court of Appeals in the subject decision. Thus, in *Buryan v. Max Factor* (SD-NY., 1967), 41 F.R.D. 330 at 332, it is stated that the general rule is that the deposition of a corporate officer must be taken either at the headquarters of the corporation or at the residence of the officer whose testimony is to be taken.

The frequency with which such questions arise underscores the justification for the issuance of the writ, for if this Honorable Court agrees that Rule 37(d) confers no power upon the damandant or the district court to require a corporate officer to travel from his home or place of business, such a determination will save countless hours of time now squandered in such fruitless and unsure disputes.

As to Default Judgement

The importance of granting the writ on this score is largely to require conformance to *Societe Internationale* and *Hovey v. Elliott* (note 3 supra), for the present default judgment was clearly granted as punishment — the Court of Appeals twice speaks of it as being "forseeable" and not once does it suggest that it was appropriate as a vindication of a claim asserted by the Government — and since there was no refusal to make discovery but only a refusal to travel 9,000 miles to do so, the conditional inference that is demanded by *Societe Internationale* cannot be found in this litigation. Further, of course, there is the important question of whether Rules 54(c), 55(a), and 55(d) impose restrictions on Rule 37(d).

As to the District Court's Lack of Jurisdiction

The importance of this question arises from the need to consider Section 1655 in the light of *Pennoyer v. Neff* (supra note 1); alternatively, the question of whether the rule in *Shields v. Barrow* applies and whether the District Court was obligated to take account of the considerations confided, initially at least, to its discretion by Rule 19.

It is important for the profession and the courts to know whether such a judgment as was granted below is void under the rule in *Pennoyer v. Neff*, for it is not to be doubted that the trail blazed by the Government in this suit will be followed by others.

CONCLUSION

A thoughtful reading of the subject decision's treatment of Rule 24 can only bring confusion and dismay to judge or counsel who compares it with the text of the Rule itself and with other decisions that have construed it. Intervention is too important and useful a device in today's judicial process to be smothered under such uncorrected error. If those always puzzling but never meaningless italics – *"cert. den."* – were to be appended to the subject decision, that confusion and dismay would apparently be ligitimatized.

The present decision's refusal to take account of *Societe Internationale* is all that *needs* to be said on the issues relating to Rule 37(d). But if as that case made clear, it is desirable to avoid a direct confrontation between procedural due process and the claimed power of the courts to grant default judgment, the other issues herein presented as to the purpose and limits of Rule 37(d) may be helpful, for if they are resolved in the way Teffina thinks they should be, a substantial insulation between the two would be thereby established, and certainly it would avoid countless hours now wasted both in and out of court.

The problem as to the District Court's lack of jurisdiction is not so readily apparent as the other errors in the Courts below, but the issue raised by the Government's use of Section 1655 despite the prohibition in Rule 24(c) against the use of

summons by any intervenor is an important question that should be resolved by this Honorable Court.

Possibly all that is necessary in the matter of this Petition is summary reversal, and if so Trefina would be content. But if this Honorable Court wishes to utilize the facts in this litigation to illuminate the purposes and limits of the Rules involved, Trefina will gladly bend its best efforts to a brief on the merits.

Respectfully submitted,

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APPENDIX

[CAPTION IN THE DISTRICT COURT]

ORDER ALLOWING INTERVENTION

Upon the motion by the United States of America and for good cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the United States of America is granted leave to intervene in this consolidated action.

2. That a copy of the Complaint in Intervention be served upon all parties to this action by mailing a copy to the attorney of record for each of the respective parties and that such parties shall answer or otherwise plead in response thereto within 20 days from the receipt of the Complaint in Intervention.

s/Leo Brewster
United States District Court Judge

[CAPTION IN THE DISTRICT COURT]

DEFAULT JUDGMENT

This cause having come on for hearing on the motion of the intervenor United States of America for a default judgment under Rule 37(d) of the Federal Rules of Civil Procedure and the Court having considered the pleadings filed and having heard the argument of counsel and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. On July 5, 1968, the intervenor United States of America served a notice that the deposition of Mr. Widmer would be taken on August 5, 1968, at the office of the United States Attorney, Dallas, Texas.

2. Mr. Widmer did not appear as required by the notice to take deposition; however, on August 5, 1968, a motion to quash the notice to take the deposition of Mr. Widmer was served on the United States Attorney, Dallas, Texas.

3. On August 6, 1968, this Court after a hearing denied the motion to quash filed by the intervenor Trefina, A. G., and ordered that Mr. Widmer's deposition be taken in New York, New York within sixty days from August 6, 1968.

4. On September 16, 1968, the intervenor United States of America served a notice that the deposition of Mr. Widmer would be taken on October 4, 1968, at the office of the United States Attorney, New York, New York.

5. Mr. Widmer did not appear as required in the notice to take deposition.

6. On October 4, 1968, the intervenor United States filed a motion to renew its motion for default judgment which was heard at the hearing held on August 6, 1968.

7. On October 28, 1968, this Court after a hearing held on October 16, 1968, entered an Order which provided in part that the Court would delay ruling on the intervenor United States' motion to renew motion for default judgment and that Mr. Widmer's deposition shall be taken in New York, New York within thirty days from October 16, 1968.

8. The affidavit filed by Martha Joe Stroud, Assistant United States Attorney reveals that the attorneys for the intervenor Trefina, A. G., have been unable to arrange a date for the taking of Mr. Widmer's deposition within thirty days from October 16, 1968.

9. The intervenor Trefina, A. G., wilfully failed to have Mr. Widmer, one of its officers, appear in New York, New York, for the taking of his deposition as required by this Court in Orders entered on August 5, 1968 and October 28, 1968.

10. The intervenor United States of America's tax liens which arose upon the making of assessments against Charles

F. O'Neall for unpaid 1963, 1964 and 1965 income taxes in the total amount of $734,826.25, plus accrued unassessed interest as provided by law are prior and superior to any right, title, and interest given the intervenor Trefina, A. G., in Charles F. O'Neall's letter dated February 20, 1959, which purports to assign his commission arising under an agreement with Southeastern Drilling Co. of Argentina, S. A. dated February 13, 1959.

11. The intervenor Trefina, A. G., is hereby ordered to execute the necessary papers to transfer its interest in escrow account E described in the escrow agreement filed with this Court on January 10, 1968.

Done and Ordered at Dallas, Texas this 5th day of December, 1968.

s/W. M. Taylor, Jr.,
United States District Judge

APPENDIX

United States Court of Appeals
for the Fifth Circuit

No. 27197

[CAPTION]

(March 2, 1970) [p.2]

Before THORNBERRY, GODBOLD and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge: The trial court granted default judgment against appellant Trefina, A.G., in this case, as a sanction for the repeated failure of that corporation's officer, Widmer, to make himself available for deposition. Trefina now appeals, contending (1) that the intervention of the United States, the party requesting the deposition below, was improper in this case; and (2) that the court's use of the harsh sanction of default judgment was an abuse of discretion. We find that the intervention was proper. Furthermore, we conclude that the default judgment was a foreseeable, just and appropriate response to Trefina's failure to comply with the order of the court, and we accordingly affirm.

The appeal before us is a relatively simple portion of a lengthy, complicated case. The suit began with drilling contract work done in Argentina by Southeastern Drilling Company, a Panamanian corporation. Southeastern realized a substantial profit on the contract, and a number of persons sued it in the United States to recover commissions allegedly due them. Trefina, the appellant here, entered the case by intervention and claimed on an assignment from one of the original agents. Trefina is a Swiss corporation that does no business in the United States.

The performance of the commission agreement was rendered more complicated by a claim of the Internal Revenue Service that Southeastern owed income tax [p. 3] on the proceeds of the drilling contract. The Government moved to intervene in this case to assert a lien against the funds claimed by Trefina. The

case had been divided into separate trials, one of which concerned a dispute between the claimants themselves and the other of which concerned Southeastern's liability; the Government had no interest in the claimant's dispute and sought to intervene in the second trial only. The court held a hearing on the intervention issue while the jury was out during the first trial. With counsel representing all parties present at the hearing, the court granted the Government's motion to intervene.

Having intervened, the Government sought to take the deposition of Trefina's officer Widmer. It gave Trefina notice, through its attorney of record, that it intended to take the deposition on a fixed date in Dallas, Texas. Mr. Widmer did not appear. Instead, Trefina filed a motion to quash the deposition notice *on the day set* for the taking of the deposition; again Mr. Widmer failed to appear without prior communication from Trefina; and again the Government moved for default judgment. Trefina filed a "medical certificate" (consisting of a letter written by a doctor in Zurich) advising that because of his health Mr. Widmer would not undertake any trip "of major importance." For the first time, Trefina also opposed the intervention of the United States, eight months after the [p.4] trial court's allowance of that intervention. The trial court again sustained the intervention and ordered for the third time that the deposition be taken, this time within 30 days. As a pointed hint to Trefina, the court did not deny the Government's motion for default judgment this time, but stated that it would delay ruling on the motion until after the 30-day period. When this time had elapsed, having been presented with an affidavit of the Government to the effect that Trefina and been "unable" on two occasions to specify a date for the deposition, the trial court held a hearing on the default judgment motion and granted it.

I. The Appealability of the Order

Before considering the merits of appellant's case, we are faced with a jurisdictional question. We must decide whether this order, disposing of only a part of the case is appealable in the context of this multiple-party, multiple-claim litigation. There is no question that the order is final in the sense that it completely determines the priority of the United States' rights

as against Trefina, but Rule 54(b), Fed. R. Civ. P., adds another dimension to the determination of the finality in cases in which multiple claims are presented. It states that any other "which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties . . ." Ordinarily, therefore, an order of the type appealed from in this case would not be final absent an express direction of the trial court entering judgment and finding that there is no just cause for delay; in accordance with Rule 54(b). [p. 5]

It has long been recognized, however, that there is a narrow class of orders, known as "collateral orders," that may be considered final for purposes of appeal even though they issue in the context of incomplete multiple-claim or multiple-party suits. The Supreme Court has defined collateral orders as "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated . . . . We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528; *see* C. Wright, Federal Courts, 98-99 (1963). *See also Local 438, Const. & Gen. Laborers' Union v. Curry*, 1963, 371 U.S. 531, 83 S. Ct. 531, 9 L. Ed. 2d 486; *Radio Station WOW v. Johnson*, 1945, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092. These authorities indicate that (1) the substance of collateral orders must be independent and easily separable from the substance of other claims, (2) at least part of the question of collateralness is determined by the need to secure prompt review in order to protect important interests of any party, and (3) the finality issue is to be examined in light of practical, rather than narrowly technical, considerations.

The default judgment here was issued as a sanction for appellant's failure to produce its officer for deposition; an issue that depends entirely on the circumstances [p.6] surrounding that failure as considered in light of a procedural rule, Fed. R. Civ. P. Rule 37(d). The record discloses little about the underlying claims for commissions, and we do not need to

know about the merits of those claims. The intervention issue is somewhat more closely intertwined with the merits of the other substantive issues, but only as regards the practical relationship of the Government's interest in the case to interests of other parties; and we think that this question can be determined without reference to the merits of the other issues. Thus the order appealed from is collateral in the sense that it is completely separable and independent from all other claims of all other parties. As a practical matter, furthermore, there is a need to secure prompt review to protect the legitimate interests of the appealing party, since Trefina's commission would be subject to the claims of the United States unless the default judgment were vacated on appeal. Trefina cannot make important decisions about it further participation in this suit without having its rights determined now. For these reasons, we hold that the default judgment is an appealable collateral order and that Trefina may also attack the intervention, which was prior to and necessary for the default judgment, on this appeal.

II. The Intervention Issue

We turn next to consideration of the question whether intervention by the United States was proper under Fed. R. Civ. P. Rule 24. The Government intervened here not because the underlying issues were of public [p.7] concern, but simply because it wanted to assert a lien (unrelated to the underlying issues) on a fund before the court. Subsection (a) of Rule 24 provides for intervention of right upon timely application when either (1) a statute of the United States confers an unconditional right to intervene or (2) the applicant claims an interest relating to the subject of the action which may as a practical matter be impaired unless intervention is allowed and which is not adequately represented by existing parties.

A. The Government's Right to Intervene

The Government asserts that a statute, Int. Rev. Code of 1954 Section 7424, afforded it an unconditional right to intervene in this case. Section 7424 provides that "If the United States is not a party to a civil action or suit, the United States *may intervene* in such action or suit to assert any lien arising under this title on the property which is the subject of such action or suit" (emphasis added). On its face, this language

seems unconditional. The issue is rendered somewhat doubtful, however, by further language providing for the preservation of any valid lien in the event the Government's application to intervene is denied, a provision that obviously recognizes the possibility of denial. The legislative history of the statute, furthermore, lends some support to appellant's contention that the right is not intended to be absolute.[1] We find, however, that actually we do not need to consider the question whether Section 7424 gives an unconditional right to intervene, be- [p.8] cause the conditions required by the second subsection of Rule 24(a) are met in this case.

This latter intervention provision requires three things: (1) the assertion of interest in the subject of the action, (2) a possibility that the disposition of the action may as a practical matter impede protection of the interest, and (3) inadequacy of representation of the interest by existing parties. Appellants contend that the intervention here fails to meet the Rule in all three respects. They first argue that the Government does not assert a sufficient interest in the subject of the action. It is true that, even though Rule 24(a) (2) provides that propriety of intervention is to be tested by practical considerations, intervention still requires a "direct, substantial, legally protectable interest in the proceedings." *Hobson v. Hansen*, D.D.C. 1968, 44 F.D.R. 18, 24. We do not believe, however, that the interest has to be of a legal nature identical to that of the claims asserted in the main action, as appellants seem to suggest. All that is required by the terms of the rule is an interest in the property or other rights that are at issue, provided the other elements of intervention are present. The cases cited by appellants are cases in which intervention was denied because the interest was speculative or had no legally protectable nature.[2] [p.9]

[1] *See* U.S. Code Cong. & Admin. News 3724, 3747-48 (1966) (Senate Report on Federal Tax Lien Act of 1966).

[2] *Old Colony Trust Co. v. Penrose Indus. Corp.*, 3d Cir. 1968, 387 F.2d 939 (would-be purchasers of property sold to satisfy security agreement have no cognizable interest); *United States v. Benford*, N.D. Ill 1968, 44 F.R.D. 231 (potential criminal defendant may not intervene in action to oppose subpoena against third party, even though evidence subpoenaed may damage him); *Isbrandtsen Co. v. S.S. Kokoh Maru*, S.D.N.Y. 1966, 263 F. Supp. 784 (owner of damaged goods has no interest in action between bailee and subsequent bailee who had

By contrast, the Government in this case is asserting a tax lien, clearly a legally cognizable interest in property, which it seeks to attach to a res that is before the court. Interests in property are the most elementary type of right, that Rule 24(a) is designed to protect. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 1967, 386 U.S. 129, 122, 87 S. Ct. 932, 936, 17 L. Ed.2d 814; *Atlantis Dev. Corp. v. United States*, 5th Cir. 1967, 379 F.2d 818, 826. We hold that the Government is asserting an interest in the property that is the subject of the suit within the meaning of Rule 24(a).

Appellants also contend that the Government has not shown that it may be impeded as a practical matter in protecting its interest if intervention is denied. This argument is based upon the undeniable proposition that if the Government is not in the suit, it will not be affected by stare decisis, res judicata, the law of the case or any other doctrine that could render its claim incapable of legal enforcement. The Government, we recognize, could simply file an independent suit once the winners of the present action were determined. The soundness of this premises, however, is no guarantee against sophistry in the conclusion. Obviously, legal concepts do not completely determine practical relationships, and that is the reason the rule is written as it is. Trefina is a Swiss corporation. As appellants themselves point out, the United States cannot get in per-[p.10] sonam jurisdiction over it here.[3] We have no difficulty in holding that a decision resulting in the necessity of the United States bringing a lien action in the Swiss courts, to assert rights in property that is now being adjudicated by a court of the United States, would "impede" the protection of those rights "as a

possession of the goods when damaged); *Hobson v. Hansen*, D.D.C. 1968, 44 F.R.D. 18 (interests of some prospective intervenors unspecified, interests of public official in protecting reputation not cognizable where legality only of official action at issue.)

[3]Trefina argues that its unavailability for service weighs against our affirmance of the intervention. It cites cases in which litigants have used the device of intervention in suits in which they had no interest in an attempt to secure *in personam* jurisdiction that was otherwise unattainable. This case presents no such "bootstrap" situation. The Government is entitled to intervene not because of the issues in the suit or the parties, but because it asserts an interest in the *res* before the court. As a consequence of this interest, the difficulty of suins [sic] Trefina elsewhere becomes an appropriate consideration.

practical matter" within the meaning of Rule 24. Cf. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra.* This is especially so since Congress itself has expressly recognized the inadequacy of separate tax lien proceedings in cases of this nature by its enactment of Section 7424, the statute relied upon by the Government.

Finally, appellant asserts that the rights of the Government are adequately protected by the existing parties to the main action. We disagree. Appellant is correct in stating that the Government is adequately represented as to the issue of Trefina's recovery from Southeastern. Trefina entered the suit with the sole purpose of effecting this recovery. Nonetheless, the argument is lacking in merit. Appellant ignores the fact that no existing party to the suit views the Government's tax lien favorably. Certainly Trefina does not. Where the supposed representative actually represents an interest adverse to the intervenor, the repre- [p.11] sentation is obviously not adequate. *See Martin v. Kalvar Corp.*, 5th Cir. 1969, 411 F.2d 552, 553.

Since the Government thus asserts a cognizable interest that is not adequately represented by existing parties and may be impeded as a practical matter if intervention is denied, the requirements of Rule 24(a) (2) are met in this case. The Government accordingly had a right to intervene provided its application to do so was timely. We proceed to examine this question.

B. The Timeliness of the Government's Application

Appellant Trefina points out that the application of the Government to intervene came a little over a year after the commencement of this litigation and approximately a year after the date that the Government clearly knew of the suit. Trefina also asserts that the application was filed only five days before trial. This contention misrepresents the circumstances, because the case had been broken into two separate lawsuits, and the United States was not concerned in the one that was set five days after the application. The trial court informed the parties that it would hold a hearing on the intervention before that trial was over and it did so. At the time of the intervention, there had been no legally significant proceedings in the second of the two lawsuits other than completion of discovery and a pretrial

that determined that there were to be two separate suits. There is no showing of any delay in the process of the overall litigation by the Government's filing of its application at the time it did. [p.12]

Under these circumstances, we clearly cannot hold that the application was untimely. In the first place, timeliness is a question addressed to the sound discretion of the trial court, and we cannot reverse its allowance of the intervention absent an abuse of that discretion. 2 W. Barron & A. Holtzoff, Federal Practice and Procedure Section 594 (Wright ed. 1961); 3B J. Moore, Federal Practice ¶ 24.13 [1](1969). There is no abuse of discretion here. Timeliness of intervention is to be judged by two criteria: (1) The length of time during which the proposed intervenor has known about his interest in the suit without acting, and (2) the harm or prejudice that results to the rights of other parties by delay. In the context of this lengthy, complicated litigation, based on a contract signed over a decade ago, we do not think that the Government forfeited its right to intervene solely by the passage of a year after it knew of the suit. *Cf. Kozak v. Wells*, 8th Cir. 1960, 278 F.2d 104 (application timely even though a year late); *Innis, Speiden & Co. v. Food Mach. Co.*, D.C. Del. 1942, 2 F.R.D. 261 (application timely after four years); *Alleghen) Corp. v. Kirby, 2d Cir. 1965, 344 F.2d 571 (application untimely* after sixteen months). Furthermore, the more important question is not the mere length of time but the possibility of prejudice to existing parties that the delay may cause. This consideration is to be evaluated against the liberal treatment that is to be accorded applications for intervention of right: such applications "may well be granted at a time in the suit when it would be wise to deny permissive intervention." J. Moore, *supra* at ¶ 24.13[1] Since few legally significant events have occurred in the separate part of the case in which the Government is involved, [p.13] since many courts have allowed intervention in meritorious cases after trial, after judgment, and even after settlement, *see* W. Barron & A. Holtzoff, *supra* at 368 n. 36, J. Moore, *supra* at 24-526 to 24-528, we cannot find that the time of the application caused prejudice to Trefina's rights of a magnitude sufficient to justify overturning the trial court's decision.

III. The Appropriateness of Default Judgment

The trial court granted default judgment as a sanction against Trefina pursuant to Rule 37(d), the pertinent parts of which read as follows:

> If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, . . . the court on motion or notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

Professor Wright observes that "[w]ithout adequate sanctions, the procedure for discovery would be ineffectual. Under Rule 37 a party who seeks to evade or thwart a full and candid discovery incurs the risk of serious consequences. . . . " C. Wright, Federal Courts Section 90 (1963). While it is true that the courts should impose sanctions no more drastic than those actually required to protect the rights of other parties, the language of Rule 37(d) makes clear that the application [p.14] of sanctions is entrusted to the discretion of the trial judge, and overleniency is to be avoided where it results in inadequate protection of discovery. *See* C. Wright, *supra*, at 346 & n. 14.

Trefina attempts to show abuse of discretion by comparing each of the clauses of the Rule with the facts of this case and concluding that none of the requirements are met. It begins by stating that default judgments under Rule 37 are to be carefully reviewed and must be reversed unless all requirements are strictly complied with. Waterman, *An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pre-Trial Orders*, 29 F.R.D. 420, 423, 425 (1962). Trefina first argues that it had not been shown that the proposed deponent Widmer was an officer or managing agent *at the time* his deposition was to be taken. This argument is gamesmanship. The record actually contains statements by Trefina's own representatives that Mr. Widmer was an officer. Trefina has never denied that he was. Under these circumstances, we think it far more probable than

Finally, Trefina argues that abuse of discretion inheres in the application to these facts of the harshest sanction available under the Rules. We have found, however, that the requirements of the Rule were met and that consequently one of the sanctions should have been applied, and we are unable on review to hold that the trial court could have fashioned an equally effective but less drastic remedy. The Rule provides three possible actions: Striking of pleadings, dismissal, or default judgment. Since Trefina is defending this part of the action against the Government, dismissal or striking of pleadings would be inappropriate. Dismissal of Trefina's affirmative complaint seeking its commission would be a sanction against it also but would operate to cutoff the derivative rights of the United States in the fund Trefina claims. The default judgment was warranted, also, in light of the strong showing of willful evasion by the proposed deponent. As the court stated in *Pioche Mines Consolidated, Inc. v. Dolman*, 9th Cir. 1965, 335 F. 2d 257, 265, in sustaining a similar default: "The Court kept the door open until it became very clear that [the proposed witness] would depose only upon his own terms, regardless of what the court's terms might be. Rule 37(d) advised him of the consequences." Here, appellant was in a position not only to see the sword of Damocles hanging over its [p. 17] head but to watch as the events it set in motion sawed at the thread securing the sword. Prudence, if not a willingness to respect the trial court's orders, should have prompted it to move in some direction. Thus the default judgment was a foreseeable and appropriate response to Trefina's refusal to act, and we hold that the trial court did not abuse its discretion in ordering it.

AFFIRMED.

[CAPTION]

(May 6, 1970)

ON PETITION FOR REHEARING

Before THORNBERRY, GODBOLD and MORGAN, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

The opinion of the Court is modified, however, in the following manner, which does not relate to the merits of the case. After the last paragraph and before the word "AFFIRMED," the following language is added:

"It should be noted that Trefina's special counsel on this appeal became counsel of record only on October 3, 1968, and did not participate in the events prior to that date which contributed to the granting of the default judgment."

UNITED STATES COURT OF APPEALS

Fifth Circuit

Office of the Clerk

June 16, 1970

Mr. Thomas W. Luce, III
Attorney at Law
2280 First National Bank Building
Dallas, Texas 75202

No. 27197 * * *

Dear Sir:

* * *

I am authorized by the court to return Trefina's motion for enlargement of time and other relief since same has already been denied by this court's order of June 3, 1970. Also returned herewith is Trefina's petition for rehearing en banc, since Rule 35 of the Federal Rules of Appellate Procedure specifically states that the time in which to file a petition for rehearing en banc must be made within the time prescribed by Rule 40 FRAP. The 14-day period for filing this petition for rehearing en banc expired on March 27, 1970.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By s/ R. E. Windhorst, Jr.
R. E. Windhorst, Jr.
Deputy Clerk